IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| TELAMERICA MEDIA INCORPORATED | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| AMN TELEVISION MARKETING, et al. | : | NO. 99-2572 |

**MEMORANDUM AND ORDER**

HUTTON, J. December 21, 1999

Presently before the Court is Plaintiff's Motion for Preliminary Injunction (Docket No. 3) and Defendants' response by way of Motion to Dismiss (Docket Nos. 6 & 8). For the reasons stated below, the Plaintiff's Motion is **GRANTED**. Defendants' Motion to Dismiss is **DENIED**.

## I. BACKGROUND

Plaintiff TelAmerica Incorporated ("TelAmerica"), a Delaware Corporation with its place of business in Philadelphia, Pennsylvania, is seeking injunctive relief against Defendants, AMN Television Marketing ("AMN") and Joseph Gray, for an alleged breach of a non-compete agreement. Joseph Gray is the former president of TelAmerica, and majority owner of AMN. The non-compete agreement which Defendants are subject to prohibits them from competing with Plaintiff in the cable programing market through July 28, 2000 pursuant to the terms of the July 1998 Mutual Settlement and Compromise Agreement. Defendants have disclaimed any obligation

under the agreement asserting that the agreement and its restrictions are no longer in effect. Plaintiff claims that Defendants' alleged breach has and is currently causing irreparable harm to TelAmerica's market advantage and goodwill. Plaintiff further asserts that said injuries are not compensable through traditional monetary damages. Defendants in this matter have failed to provide the Court with any evidence in which to consider the merits of its claims, other than simple reproductions of relevant contractual provisions. Further, Defendants fail to support their response to Plaintiff's Motion with affidavits or other evidence which would allow the Court to determine the existence of any genuine dispute concerning the material facts in this matter.

## II. DISCUSSION

### A. Defendants' Objections

Defendants make numerous vague objections to the enforceability of the underlying non-compete agreement, and thus the availability of a preliminary injunction. As such, before the Court considers the merits of Plaintiff's motion these objections will be resolved.

#### 1. Jurisdictional Objections

First, Defendants claim that the Court lacks personal jurisdiction, venue, and subject matter jurisdiction. These

objections are clearly without merit as the non-compete agreement is a Pennsylvania Contract entered into between Plaintiff and Defendants, which contains a provision explicitly stating that Pennsylvania law controls the agreement. (See Non-Compete Agreement ¶ 8); see also Roadway Packaging Sys, Inc. v. Kayser, No. CIV.A.99-MC-111, 1999 WL 817724, at *3 (E.D. Pa. Oct. 13, 1999) (stating Pennsylvania courts generally honor the intent of the contracting parties and will enforce a choice of law provision in a contract (citing Smith v. Commonwealth Nat'l Bank, 557 A.2d 775, 777 (Pa. Super. 1989))). Further, the agreement states in the clause relating to injunctive relief, that any action for breach may be brought in any Federal Court in the Eastern District of Pennsylvania, and that each party waives any objections to venue or jurisdiction. (See Non-Compete ¶ 6); see also Cottman Transmission Sys. v. Martino, No. CIV.A.92-7245, 1993 WL 306183, at *1 (denying a motion to dismiss for lack of personal jurisdiction because parties agreed to jurisdiction and venue, thus defendants should have reasonably anticipated being haled into court in Pennsylvania).

As Defendants do not dispute that they purposely entered into this agreement with TelAmerica, it is obvious Defendants' contact with the forum is not fortuitous, but rather the result of intentional negotiations with a Pennsylvania business. See Paolino v. Channel Homes Ctrs., 668 F.2d 721, 724 (3d Cir. 1981) (finding

personal jurisdiction over defendant where the action rises out of a breach of a Pennsylvania contract); see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478, 105 S. Ct. 2174, 2185, 85 L. Ed.2d 528 (1985) (finding that an out of state Defendant was subject to personal jurisdiction in Florida for breach of a franchise agreement with a Florida business).

Further, irrespective of the agreement, venue is proper in the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1391(a)(3). First, Defendants do not reside in the same state, but rather separately in California and Nevada. (See Def.'s Mot. to Dismiss at 5); see also § 1391(a)(1). Second, although the breach of contract effects Pennsylvania, the actual and potential violations of the non-compete agreement are national in scope. Thus, there is no one judicial district in which it can be said that a substantial part of any injury will or has occurred. (See Def.'s Mot. to Dismiss at 8 (stating actions were directed toward Colorado and Louisiana)); see also § 1391(a)(2). Third, since Defendants are subject to specific personal jurisdiction in the Eastern District of Pennsylvania, as discussed above, and there is no other proper judicial district, this matter is correctly before the Court. See § 1391(a)(3).

**2. Unclean Hands and Nullification**

Recognizing that an injunction is an equitable remedy, Defendants assert that Plaintiff has also breached the agreement,

and thus has "unclean hands." As such, Defendants maintain that because of this breach Plaintiff is not entitled to an injunction. (See Def. Mot. to Dismiss at 19).

First, Defendants present no evidence or affidavit demonstrating such a breach, nor do they cite any authority in support of their "unclean hands" argument. See Stinchcomb v. United States, 132 F.R.D. 29, 31 (E.D. Pa. 1990) (stating that "[t]he court cannot rely on conclusory statements in briefs by counsel."). Second, Defendants stating that they believe this issue to be premature fail to engage in any substantive discussion of the merits of this position. (See Def.'s Mot. to Dismiss at 19). As such, the Court finds that there is no basis to deny an injunction on the grounds of "unclean hands."

Defendants also claim that the Non-Compete Agreement is superseded by the Mutual Compromise and Settlement Agreement entered into by the Parties. (See Def.'s Mot. to Dismiss at 4, 20). The Court finds no basis for such a conclusion as the Mutual Compromise and Settlement Agreement unambiguously states that "[t]he Non-Competition Agreement shall continue in all aspects, but only in accordance with those terms applicable under the circumstance that TelAmerica has failed to timely exercise the Option under the Purchase Agreement . . . ." (See Settlement Agreement ¶ 3.8(d)). Thus, said language, contrary to Defendants' suggestion, is unambiguous in its equivocation that the Non-Compete

Agreement continues despite the signing of the Mutual Settlement and Compromise. See Arnold M. Diamond, Inc., v. Gulf Coast Trailing Co., 180 F.3d 518, 521 (3d Cir. 1999) (stating that unambiguous contract language is entitled to judgment as a matter of law if it is only subject to one reasonable interpretation).

Further, the Court finds that the Arbitration Clause contained within the Mutual Compromise and Settlement Agreement is not applicable to the Non-Compete Agreement. Said provision states that the agreement to arbitrate is applicable "[e]xcept as expressly set forth in any of the aforementioned and binding agreements to the contrary . . . ." (See Settlement Agreement at ¶ 18). As the Non-Compete Agreement is an existing binding agreement, and it contains a contrary provision providing for injunctive relief, to apply the Mutual Compromise and Settlement Agreement's arbitration clause is clearly contrary to the parties intentions. (See Non-Compete Agreement ¶ 6); see also Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1523 (3d Cir. 1994) (stating that although there is a presumption concerning the scope of arbitration, before such presumption is applicable there must be a clear and unequivocal contractual obligation to arbitrate the claim).

**3. Enforceability of Non-Compete Agreement**

Defendants suggest that the terms of the Non-Compete Agreement are unenforceable because its scope is overly broad in

time and geography. (See Def.'s Mot. to Dismiss at 16). The relevant terms in question are the Non-Compete Agreement's two (2) year exclusionary period, (see Settlement Agreement ¶ 3.8(d); see also Aff. of Funston ¶ 6), and the national scope of the restriction. (See Non-Compete at 1(a); see also Def.'s Mot. to Dismiss at 17).

Under Pennsylvania Law a covenant not to compete will be enforceable "so far as reasonably necessary for the protection of the employer." Sidco Paper Co. v. Aaron, 351 A.2d 250, 254 (Pa. 1976). In the context of an equitable remedy, such as a preliminary injunction, the Pennsylvania Supreme Court has stated that "where the covenant imposes restrictions broader than necessary to protect the employer, we have repeatedly held that a court of equity may grant enforcement limited to those portions of the restrictions which are reasonably necessary for the protection of the employer." Id. In determining "whether to enforce a post-employment restrictive covenant, we must balance the interest the employer seeks to protect against the important interest of the employee in being able to earn a living in his chosen profession." See Thermo Guard, Inc. v. Cochran, 596 A.2d 188, 193-94 (1991) (analyzing the availability of an injunction based upon a non-compete clause).

The Court finds that neither the two year time limitation, nor the territorial scope of the agreement are overly

broad or unreasonable. The Defendants assert, without any legal authority, that agreements beyond one year in scope are as a matter of law unreasonable. Pennsylvania case law, however, clearly holds to the contrary. See DeMuth v. Miller, 652 A.2d 891, 900 (Pa. Super. 1996) (finding that where Defendant agreed to a five year non-compete clause he must adhere to it, absent evidence of a public policy violation). Defendants in this matter present no arguments or evidence as to why the two year restriction is an unreasonable means of protecting Plaintiff's interest. See John G. Bryant Co. v. Sling Testing & Repair, 369 A.2d 1164, 1169-70 (1977) ("The law is clear that the burden is on him who sets up unreasonableness as the basis of contractual illegality to show how and why it is unlawful.").

Furthermore, although the non-compete clause is national in scope, such restriction is reasonable given the national nature of Plaintiff's distribution. See Kramer v. Robec, Inc., 824 F. Supp. 508, 512 (E.D. Pa. 1992) (upholding a national two (2) year non-compete covenant when employer engaged in national distribution). Again, Defendants fail to explain how such restriction is an unreasonable means of protecting Plaintiff's interest. Furthermore, as applied to the facts of this matter, Defendants are only restricted from engaging in cable based programing. They are, however, free to engage in business which is

broadcast, rather than cable based. (See Non-Compete at 1(a) & (b); see also Pl.'s Resp. to Def.'s Mot. to Dismiss at 7).

As a result of the foregoing, the Court finds that Defendants have failed to establish that the terms of the Non-Compete Agreement are unreasonable or in violation of public policy. Thus, Defendants' objections concerning the enforceability of the agreement present no basis for dismissal or denial of a preliminary injunction.

**4. Accord and Satisfaction**

Lastly, Defendants make a vague assertion under the guise of "accord and satisfaction" that the Parties negotiated a settlement of this matter. The Court, however, fails to find any such release contained within Defendants papers. The Plaintiff, however, does provide the Court with a letter dated November 5, 1998 which evidences a $6,000 deposit paid to AMN, to be returned should the consulting service relationship terminate. (See Letter of Augugliaro to AMN, Dated Nov. 5, 1998; see also Aff. of Vinicombe). Further, Plaintiff provides an affidavit of TelAmerica's Chief Executive Officer, which states that the refund of this $6,000 deposit on January 29, 1999 was not a release, but rather the payment of an undisputed debt on the part of AMN. (See Aff. of Funston at 6).

As the Court is without affidavits to the contrary, and Defendants discussion on this point is vague at best, there appears

to be no basis to concluded that Defendants have been released from the Non-Compete Agreement.

**B. Preliminary Injunction**

**1. Standard of Review**

The grant of injunctive relief "is an 'extraordinary remedy, which should be granted only in limited circumstances.' " Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797 (3d Cir. 1989) (quoting Frank's GMC Truck Center, Inc. v. General Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988)). In Federal Court, a federal standard is used in examining motions for a preliminary injunction, even when the cause of action is state-created. Id. at 799. The Court must carefully weigh four factors in deciding whether to issue a preliminary injunction: "(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest." Allegheny Energy, Inc., v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999) (quoting American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1466 n.2 (3d Cir. 1996)). Nevertheless, if the Court finds that "either or both of the fundamental preliminary injunction requirements –a likelihood of success on the merits and the probability of irreparable harm if relief is not granted –to be absent," the Court cannot issue an injunction. See McKeesport Hosp. v. Accreditation Council for

Graduate Medical Educ., 24 F.3d 519, 523 (3d Cir. 1994) (citing Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 198 (3d Cir. 1990)); see also Instant Air Freight, 882 F.2d at 800 n.5.

For a movant to prove irreparable harm, it must demonstrate "potential harm which cannot be redressed by a legal or an equitable remedy following trial." See Instant Air Freight, 882 F.2d at 801. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Id. (citation omitted). Thus, an injury warranting a preliminary injunction must "be of a peculiar nature, so that compensation in money cannot atone for it . . . ." Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994). Further, the irreparable injury claimed by the movant cannot be speculative or remote. "[M]ore than a risk of irreparable harm must be demonstrated." Id. at 655 (citations omitted).

**2. Discussion**

As an initial matter TelAmerica asserts that the Court must grant injunctive relief because the parties to the non-compete agreement consented to such a remedy. (See Pl.'s Mot. for Prelim. Inj. at 12). The Court, however, is not bound by such a contractual agreement and must independently evaluate the movant's

request for a preliminary injunction. See Dice v. Clinicorp, Inc., 887 F. Supp. 803, 810 (W.D. Pa. 1995) (holding that while the inclusion of such a contractual provision may constitute evidence of irreparable harm, the mere inclusion cannot act as a substitute for a showing of irreparable harm); see also Armstrong World Indus., Inc. v. Allibert, No. CIV.A.97-3914, 1997 WL 793041, at *15 (E.D. Pa. Nov. 26, 1997) ("A contractual agreement that money damages will be insufficient to remedy a breach never trumps the court's own analysis."). As such, the Court finds no basis to grant TelAmerica an injunction solely because the non-compete agreement states that "damages alone shall not be an adequate remedy for any breach . . . ." (See Non-Compete Agreement ¶ 6). Rather, said provision is simply evidence to be considered in the context of irreparable harm.

**a. Reasonable Likelihood of Success on the Merits**

Since the Court has discovered no reason to conclude that the Non-Compete Agreement is unenforceable, the remaining consideration surrounding the agreement is whether or not Plaintiff is reasonably likely to succeed on the merits of its claim.

Defendants in this matter have failed to provide any affidavits or other evidence which would support their claim that Plaintiff is in breach, or that Defendants have been released from the non-compete restrictions. Further, the unambiguous language of the Non-Compete Agreement and the Mutual Compromise and Settlement

Agreement, when read together clearly support the conclusion that Defendants are prohibited from engaging in the cable programing, but not broadcast, business for a period of two (2) years. (See Non-Compete Agreement ¶ 1(a); see also Settlement Agreement ¶ 3.8(d); Aff. of Funston ¶ 6). Moreover, Plaintiff has submitted a sworn affidavit with supporting documentation evidencing the fact that TelAmerica did not breach the terms of the Non-Compete Agreement or the respective underlying agreements, that it never improperly solicited employment from any AMN employee, and that Defendants have not been released from the non-competition restriction. (See Aff. of Funston ¶¶ 1-12; see also Aff. Vinicombe).

As Defendants have provided no evidence to the contrary, and admit to engaging in competition in Colorado and Louisiana (see Def.'s Mot. to Dismiss at 8), the Court finds that it is reasonably likely that Plaintiff will succeed on the merits.

**b. Irreparable Harm**

Although Plaintiff may succeed on the merits, Plaintiff must also make "a 'clear showing of immediate irreparable injury.' " See Armstrong, 1997 WL 793041, at *15 (citing Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 91-92 (3d Cir. 1992)). While a claim based upon a simple economic loss of business would fail to meet this difficult standard, see Instant Air Freight, 882 F.2d at 801-02, Plaintiff in this matter also claim loss of goodwill and

the disclosure of confidential information related to their practices within the cable industry. (See Aff. of Funston ¶¶ 7-8, 10).

The Court is most persuaded by TelAmerica's confidentiality concerns. Mr. Gray, the former President of TelAmerica, is now competing directly with TelAmerica through AMN in the cable program market. (See Aff. of Funston ¶ 10). As Plaintiff explains, Mr. Gray through his previous position is in possession of "information regarding its business relationships with . . . cable system operators and advertising agencies" which is critical to TelAmerica's business. (See Aff. Funston ¶ 8). The Court finds that the existence of such condition is highly likely to result in un-compensable damage to TelAmerica. See Hamburger Color Co., Inc., v. Landers-Segal Color Co., Inc., No. CIV.A.95-1293, 1995 WL 447484, at *2-3 (E.D. Pa. June 29, 1995) (finding irreparable injury when distributor through his position knew the identity of customers, and prices charged); see also Star Datacom, Inc. v. Herbert J. Morrision & Assoc., No. CIV.A.88-5438, 1998 WL 98459 (E.D. Pa. Aug. 23, 1989) (finding that "it is extremely difficult to determine to what extent [defendants] are using the confidential lists in their possession, the potential harm to [plaintiff] is irreparable").

Joseph Gray, as the former TelAmerica president, and AMN are most certainly in possession of information concerning the

business practices of TelAmerica. (See Aff. of Funston ¶ 8-9). Such information would not have been available to Defendants, but for their prior relationship with TelAmerica. Although Defendants, assert that such injury can be compensated through money damages, the Court disagrees. In reality, a jury would have great difficult assessing the damage that the use of said information would cause, beyond that of an immediate loss of business. As Plaintiff explains, the disclosure or use of this information will affect TelAmerica's future relationships with advertisers. (See Aff. Funston ¶ 9). Clearly, the calculation of such future injury, would be an impossible task for a jury to determine. Further, it would be next to impossible to determine to what extent Gray and AMN used this confidential information to gain a business advantage, versus business obtained via normal competitive channels. Such a condition, only servers to further complicate any monetary determination of injury. See Hohe v. Casey, 868 F.2d 69, 73 (3d Cir. 1989) (" '[I]rreparable injury is suffered where monetary damages are difficult to ascertain.' ") (citation omitted). These factors, combine with the fact that the Non-Compete Agreement explicitly states that damages are inadequate and that the parties agree to an injunctive remedy, weigh heavily in favor of a finding of irreparable injury. (See Non-Compete ¶ 6). As such, the Court finds that irreparable injury exists for the purposes of a preliminary injunction.

**c. Harm to Non-Moving Party and Public Interest**

The granting of this injunction certainty stands to cause economic harm to Defendants as it requires the discontinuation of business and solicitation within the cable programing market. Nevertheless, such injury is mitigated by the fact that Defendants are free to engage in the broadcast programing markets without restriction. (See Non-Compete at 1(a) & (b); see also Pl.'s Resp. to Def.'s Mot. to Dismiss at 7). As such, the potential harm suffered by Defendants is little more than that which existed prior to the relationship between TelAmerica, Gray, and AMN.

Further, the Court finds no reason in which to conclude that the public interest would be harmed by enforcing the Non-Compete Agreement. Federal and State case law is replete with cases upholding contracts with similar terms and conditions. Defendants have not shown any factors to mitigate this or tip the balance of equities in their favor.

**d. Rule 65(c) Security**

In the context of a commercial case, the Third Circuit has stated that "a district court commits reversible error when it fails to require the posting of a bond by the successful applicant for a preliminary injunction," pursuant to Rule 65(c) of the

Federal Rules of Civil Procedure.\[1] See Instant Air Freight, 882 F.2d at 803-04. This requirement must be followed, even when the bond creates a barrier to the granting of the injunction. Id. at 804. Such a requirement is necessary to mitigate the risk of economic harm from a preliminary injunction in which the movant ultimately fails to succeed on the merits. See Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 209-10 (1990).

As this matter is clearly commercial in nature, the granting of a preliminary injunction in favor of Plaintiff requires the posting of a Rule 65(c) bond. As neither party has adequately evidenced the amount of monetary risk the Court should consider in requiring such bond, the Court must make an independent determination. See Fed. R. Civ. P. 65(c). As such, given the commercial nature of this matter, the Court requires Plaintiff to post a bond in the amount of $10,000 as security against an improperly obtained preliminary injunction.

An appropriate Order follows.

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[1] No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of costs and damages as may be incurred or suffered by any party who is found to have been wrongly enjoined or restrained. See Fed. R. Civ. P. 65(c); see also Fed. R. Civ. P. 65.1.

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**O R D E R**

AND NOW, this 21st day of December, 1999, upon consideration of Plaintiff's Motion for Preliminary Injunction (Docket No. 3), and Defendants' response by way of Motion to Dismiss (Docket Nos. 6 & 8), IT IS HEREBY ORDERED that:

(1) Defendants' Motion to Dismiss is **DENIED;**

(2) Plaintiff's Motion for Preliminary Injunction is **GRANTED**. Pursuant to Federal Rule of Civil Procedure 65, Defendants Joseph Gray and AMN Television Marketing, are temporarily enjoined from breaching and violating the terms and conditions of the Non-Competition and Confidentially Agreement, including the non-competition covenants contained in Section 1(a), through July 29, 2000 or upon the resolution of the above captioned matter; and

(3) The above described preliminary injunction shall not take effect until such time as Plaintiff posts security in the amount of $10,000, pursuant to Federal Rule of Civil Procedure 65(c) and 65.1.

BY THE COURT:

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HERBERT J. HUTTON, J.